SU MEU GING

v.

PHILIP YONG KHIAM POON & ORS.

SUPREME COURT, KUCHING
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 329, 330, 337, 338, 339, 340, 341, 342, 347, 348, 349, 351 AND 352 OF 1986]
14 AUGUST 1987

LAND LAW: *Caveats lodged - Registered proprietor entered into agreements with developers to develop land into housing estate - Sublots sold to purchasers - Development agreements terminated - Whether purchasers had equitable interest - Serious questions to be tried - Status quo to be maintained - Whether caveat should be removed.*

The appellants had appealed against the decision of the High Court which held that caveats which were lodged in respect of certain land be removed. The respondents who were registered proprietor entered into two development agreements with a third party for the third party to develop the land into a housing estate. The third party was allotted sublots by the respondents. Subsequently, the development agreements were rescinded. The respondents gave the third party authority to develop the land. The appellant paid a total of RM1,220,000 to the third party as purchase price. In some cases, the appellants entered into separate agreements with the respondent to purchase land and with the third party to bag the house to be built on the land. It was contended that the respondent were the bare trustees of the land for the appellants who had an equitable interest in the land.

Held:
The appellants had shown that their claim for an interest in the land raised a serious question to be tried and that on the balance of convenience the *status quo* should be maintained.

[Appeal allowed.]

Cases referred to:
Temenggong Securities Ltd. & Anor. v. Registrar of Titles & Ors. [1974] 2 MLJ 45
Eng Mee Yong & Ors.v. Letchumanan [1979] 2 MLJ 214

Legislation referred to:
Land Code (Cap 81) Sarawak , s. 177

Civil Appeals Nos. 329/86 & 330/86
For the appellants - M.S. Sandhu; M/s. Sandu & Co.
For the respondents - Lawrence Lai (John Ko with him)

Civil Appeals Nos. 337/86; 338/86; 339/86; 340/86; 341/86; 342/86; 347/86; 348/86; 349/86; 351/86 & 352/86
For the appellants - Lin Kuan Yuh; M/s. K.Y. Lin & Co.
For the respondents - Lawrence Lai (John Ko with him)

JUDGMENT

Lee Hun Hoe CJ (Borneo):

We allowed the appeal with costs and stated that we would give our reasons later. We do so now.

Thirteen appeals were heard together. Although the appellant purchasers were different the respondents, the owners of the land, were the same. Encik M.S. Sandhu appeared for the appellants in respect of two appeals while Encik K.Y. Lin for the remaining appellants. Encik Lawrence Lai and Encik John Ko appeared for the respondents in all thirteen appeals.

The first three respondents are the registered proprietors of Lot 3006 Miri Concession Land District containing 1.182 hectares while the fourth respondent is the registered proprietor of Lot 3149 Miri Concession Land District containing 5,630 sq. ft. hectares. These two parcels of land are adjoining one another and situate at Lopeng, Miri. The proprietors of the two parcels of land jointly applied to the Lands & Surveys Department, Miri for subdivision and conversion into 32 sublots.

For their purposes the respondents and the Modern Development Co. (the developers) entered into two development agreements on identical terms. The first development agreement was executed on 27 August 1982 under which the developers undertook to develop Lots 3006 and 3149 together into a housing estate on a sharing basis with the respondents. The three partners of the development company who signed the first development agreement were Thong Saie Tok @ Thong Shie Tok, Lee Tze Hen and Allih bin Jameh @ Sebli Jemaah. The second development agreement was executed on 28 August 1982. However, only Thong and Lee signed this agreement. The developers sought to utilize this agreement to apply for loan from the Malayan Banking Bhd., Miri whose then credit/loan officer happened to be Allih's brother. This agreement was to avoid giving impression to the authorities concerned that the loan application, if approved, was not the result of the said officer's brotherly relationship with Allih.

Under either development agreement the developers were to build houses at their own costs and expenses on the 32 sublots. The respondents were to receive 5 two-storey semi-detached houses and 4 two-storey detached houses on 9 sublots to be chosen by them. The houses were to be completed within 18 months from the date of approval of the building plans. The other 32 sublots were to be allotted to the developers or their nominees, the transfer purportedly to be effected by the respondents upon the handing over to their possession the said nine houses by the developers. Under Clause 6 the developers would have to pay liquidated damages to the respondents in the event of failure on the part of the developers to hand over the nine houses to the respondents within the time stipulated. Time was made the essence of the agreement under Clause 15.

On the same day, i.e. 28 August 1982 the first three respondents granted a power of attorney to Thong and Lee in respect of the second development agreement to do all acts and things in connection with or incidental to the development of Lot 3006, and with power to raise money on the security of their land for the purpose of the said development.

On 21 December 1982 the respondent and the developers executed a document called "Rescission of Agreement" by which they undertook not to claim from each other any sum whatsoever as liquidated damages or as compensation for non-performance of the first development agreement. In other words, they rescinded the first development agreement. Despite this the fourth respondent on 31 January 1983 granted Thong and Lee a similar power of attorney in respect of the first development agreement. In this case the power of attorney contains a clause whereby the developers were expressly given the power to sell those sublots purported to be allotted to the developers under the first development agreement.

Encik K.Y. Lin referred to various clauses of the two development agreements and in particular to Clause 2(a) which provides that:

> At their own costs and expenses prepare or cause to be prepared and submit engineering, building plans and specifications for the construction of the said housing estate and seek approval of the same together with the subdivision plans from the appropriate authorities within 18 months from the date of signing this agreement, failing which the landowners shall be entitled to terminate this agreement and revoke the power of attorney given on even date in favour of the developer and the landowners shall not be responsible for any expenses incurred by the developer.

This is the only clause which gives the landowner the right to terminate. It is not in dispute that building plans and subdivision plans have been approved within the stipulated period. Hence, it was submitted that Clause 2(a) did not apply and the landowners could only ask for damages for delay but not termination. Also, the public relied on the development agreement and bought the sublots.

Further, appellants had paid the developers a total amount of RM1,220,000. The valuation report shows the land value to be RM1,999,000 and the forced sale value to be RM1,550,000. There were many irregularities arising as a result of dealings between the respondents and the developers giving rise to the irresistible inference of collusion bordering on fraud. Both the respondents and the developers benefitted at the expense of the appellants.

It was submitted that the learned Judge found that equitable interest passed to the appellants. At least the appellants in 4 appeals, namely, Nos. 329/86, 330/86, 337/86 and 338/86, paid full purchase price for the sublots (12 sublots in all). They merely bought the land and intended to put up their own houses. The developers could not sell the land unless they did so with the knowledge and consent of the landowners. In other words, in disposing of the land they acted as agent for the landowners who are estopped from denying that they had given such authority to the developers. Based on the principle laid down in the case of *Temenggong Securities Ltd. & Anor. v. Registrar of Titles & Ors.* [1974] 2 MLJ 45 the landowner as principal became bare trustees for the appellant purchasers.

Encik Sandhu pointed out that it had already been shown that the development agreement could not be terminated by the parties but that the landowners could claim damages. However, the parties purported to terminate the second development agreement by a "deed of acceptance of termination" on 1 October 1985. He submitted that this was wrong, particularly when they purported to terminate the said agreement retrospectively to 17 January 1985. It was unconscionable conduct since the Originating Motion in respect of No. 329/86 was filed on 6 July 1985 and the Originating Motion in respect of No. 330/86 was filed on 2 July 1985. It is his submission that the learned Judge was wrong to accept termination for two reasons:

(i) the termination interfered with the contractual rights of the developers and purchasers;

(ii) unconscionable conduct of landowners and developers.

Encik Lawrence Lai took pains to show that there was no collusion or fraud on the part of the landowners and the developers. They were entitled to do what they did. The learned Judge was right in his decision. The landowners were not contractors. As a result of delay in handling over the nine houses to the landowners they were entitled to terminate the development agreement. However, as was pointed out earlier the appellants contended that the landowners could not terminate both development agreements but could claim damages for delay. Also, they could not terminate, as in this case, the second development agreement retrospectively after the appellants had filed their originating motion in order to put them out of Court. Such conduct, we agree with the appellants' submission, was not only unconscionable but also interfered with contractual rights.

Encik Lawrence Lai contended that the developers became the owners in equity of the 23 sublots with right to sell them but that such ownership was subject to the developers' obligation to fulfill the condition precedent under Clause 9 of either development agreement, that is to say, to hand over possession of the nine units of houses to the landowners. Consequently, any sale by the developers must also be subject to that condition precedent being fulfilled by the developers.

In this sort of arrangement trouble would start when the developers faced cash flow problem, particularly when they were not financially secure. They usually relied on deposits from financial institutions by using the land of the landowners as security. With the exception of the banks or financial institutions all could end up with nothing.

Nothing can be quite as upsetting as having the realisation of one's dream house turn to ashes when a housing project is abandoned by a developer. In the light of the present economic recession this is not exactly a new phenomenon. Buyers who get the short end of the stick can only hope that the project can be salvaged. Buyers need to be protected from unscrupulous developers out for quick profits. Government should take the initiative. One read with interest in several local newspapers that the Government is considering introducing a project account scheme to protect buyers and to minimise failure and abandonment of projects. Under the proposed scheme a developer is required to open a project account with a bank once the building plans are approved. All funds recovered from the purchasers are directed into the project account. The object of the system is to ensure that the developers have sufficient funds to complete their housing projects. In many cases the developers are not the owners of the land to be developed. The scheme must cater for such a situation. The question of implementation of the scheme has to be studied carefully if it is to be successful.

In some cases buyers entered into two separate agreements, first with the landowner to buy the land and secondly with the developer to buy the house to be built on the land. The buyers, the landowner and the developer are made parties to such agreements. The estimated prices of the land and the house are set out clearly.

The learned Judge was correct in his approach to the question whether the appellants could claim to be beneficially interested in the sublots to entitle them to maintain or continue the caveats in respect of the sublots. He rightly referred to *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 214 which clearly laid down that they must first satisfy the Court their claim to an interest in the property does raise a serious question to be tired. Secondly, they must show that on the balance of convenience it would be taken to maintain the *status quo* until the trial of the action.

The learned Judge was unable to accept the respondents' contention that the purchasers acquired no beneficial or caveatable interest under the sale and purchase agreements to support the caveats lodged by them against the sublots. He took the view that on the true construction of the two identical development agreements the developers did have a beneficial and caveatable interest in the sublots even though such interest was not absolute in the sense that it was contingent upon the developers completing the landowners' nine houses and handing over possession of the nine houses to them. In his judgment at p. 31 of the Appeal Record (No. 330 of 1986) he stated:

> ...I do not, therefore, consider that the caveats lodged by the purchasers in respect of the said sublots in these circumstances were reasonable or wrongful.

However, he considered that the purchasers could not maintain or continue their caveats on the ground that the two development agreements had been terminated. The first development agreement was rescinded by order of the High Court on 21 May 1985. The second development agreement was terminated by a Deed on 1 October 1985.

With respect, we are unable to agree with his view. We think he was wrong in his application of the test in *Eng Mee Yong's* case having regard to the particular facts of this case. As pointed out earlier, the appellants in respect of 329/86 (4 sublots), 330/86 (4 sublots), 337/86 (2 sublots) and 338/86 (2 sublots) bought 12 sublots in all by paying the full amount for the sublots. They intended to build their own houses in the sublots. These were not brought to the attention of the learned Judge. As the learned Judge rightly pointed out the developers were not the landowners how could they dispose of these sublots unless they acted as agent for the landowners. Clause 9 and also the power of attorney gave the developers the right to sell the sublots. The landowners' right against the developers under Clause 9 was in damages for delay not in termination as the latter would interfere with the contractual rights not only of the developers but also of the appellants.

The manner the two development agreements were prepared and the ways they were terminated without regard to the contractual rights of the purchasers might be said to give rise to the implication of collusion bordering on fraud on the part of the landowners and the developers. As stated earlier at least in four cases the appellants had paid in full for 12 sublots as they wished to build their own houses. As the developers were not the owners of the land they could only sell the land as agent of the landowners. The fact that the landowners had not received the money is not relevant. The landowners had parted with their interest in the land and were merely trustees for the purchasers.

We do not agree with the finding of the learned Judge that there is nothing to suggest collusion between the landowners and the developers. Whether there was collusion or fraud could only be decided at the trial and not on affidavit evidence.

In the light of the view the learned Judge took that the two development agreements were properly brought to an end it is not surprising that he held that the sale and purchase agreements could no longer be capable of specific performance. Hence, he held that the appellants were not entitled to maintain or continue the caveats.

Since the landowners are bare trustees of the sublots which were paid in full by the appellants they could not in cahoots with the developers terminate both development agreements and purports to take away the beneficial interest of those appellants. How does one explain the position of the landowners and the developers when after rescinding the first development agreement on 1 October 1985 the landowners granted the developers a power of attorney in respect of the first development agreement. The appellants said that the power of attorney was invalid. All these and other matters will have to be decided at the trial. It must be remembered that the development agreement was made part of the sale and purchase agreements coupled with the fact that one of the powers of attorney gave the developers power to sell the land.

On the whole we consider that the appellants had shown their claim to an interest in the property did raise a serious question to be tried and that on the balance of convenience it would be better to maintain the *status quo*. It is not for us to speculate whether the appellants would succeed or not at the trial. But there are clearly triable issues and they are entitled to have them tried.

Also found at [1988] 2 CLJ 26